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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1565

STATE OF IOWA, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 494 F. 2d 100. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1974. The petition for a writ of certiorari was filed on April 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of sovereign immunity extends to suits by the Secretary of Labor to enforce the Fair Labor Standards Act against a State to protect employees of state hospitals and institutions primarily engaged in the care of the sick, the aged, or the mentally ill or defective.

2. Whether such hospitals and institutions are enterprises subject to the coverage of the Act, when they have employees who are regularly engaged in interstate commerce and in the handling of articles which have moved in interstate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Amendments to the Constitution and provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth at Pet. App. C. However, the text of Section 3(s)(4) of the Act, 29 U.S.C. 203(s)(4), is incorrectly reprinted. The correct text, before the amendments of 1974, was as follows:

> Section 3(s): "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> * * * * *
>
> (4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

This section was amended after the period here in question by the Fair Labor Standards Amendments of 1974, P.L.

93-259, Section 6(a)(5), 88 Stat. 59, effective May 1, 1974. These amendments added the following sentence at the end of Section 3(s):

> The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.[1]

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act of 1938, as amended, to enjoin the State of Iowa, through its agency, the Department of Social Services, from violating the minimum wage, overtime, and recordkeeping provisions of the Act, and to require the payment of back wages due to employees in nine specified hospitals and related institutions operated by the State (Pet. 4-5).

The facts were stipulated. Each of the nine institutions regularly receives substantial amounts of medicines, drugs, and other medical supplies, foods, cleaning supplies, office supplies, equipment, clothing and other supplies manufactured or produced outside of Iowa and transported

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[1]The opening paragraph of Section 3(s) was also changed to read as follows (with the changes shown by italics):

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, *or* employees handling, selling, or otherwise working on goods *or materials* that have been moved in or produced for commerce by any person, and which—

In addition, the following was inserted after subsection (4): *or (5) is an activity of a public agency.*

* * * * *

into Iowa from other States. In each of the institutions, there are employees who regularly handle, sell, or work on these materials (Pet. 5). Moreover, each of the institutions in question has employees who, in the course of their duties, regularly prepare, send or receive purchase orders, shipment orders, invoices, bills, checks and other correspondence to or from manufacturers, producers or suppliers located outside the State (Pet. 5). Each also has employees who work in warehouses or storerooms and receive direct deliveries of articles transported to Iowa from other States, and handle, store, and move the articles after delivery (*ibid.*). Six of the nine institutions have employees who regularly transport or accompany patients or residents to points outside the State for treatment, diagnosis, or other purposes; eight of the nine have employees who in the regular course of their duties, place or receive telephone calls to or from points outside of Iowa (Pet. 5-6).

Both the district court and the court of appeals held that the institutions in question are covered by the Act as enterprises within the definition of Section 3(s)(4). They concluded also that state immunity did not extend to enforcement suits brought by the Secretary of Labor. Accordingly, the court of appeals affirmed the district court's order granting the prayer for an injunction against future violations and for restitution of unpaid wages due under the Act.

ARGUMENT

Further review of this suit by the federal government to apply federal law to State agencies is not warranted. This Court has repeatedly indicated that States are not immune from such sutis. The decision below correctly interprets the applicable statutory language, and in any event the Fair Labor Standards Amendments of 1974 deprive the decision of any continuing significance.

1. Since 1890, this Court has uniformly held that the States' immunity to suit in a federal court, whether under

the Eleventh Amendment or under the doctrine of *Hans* v. *Louisiana*, 134 U.S. 1, does not extend to suits brought by the United States. *United States* v. *Texas*, 143 U.S. 621, 642-646; *Sanitary District* v. *United States*, 266 U.S. 405, 425-426; *United States* v. *California*, 297 U.S. 175, 184-185; *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 56-60; *United States* v. *Mississippi*, 380 U.S. 128, 140-141; *Department of Employment* v. *United States*, 385 U.S. 355, 358. That principle was affirmed only last Term in *Edelman* v. *Jordan*, No. 72-1410, decided March 25, 1974, slip op. 17-18, and it of course makes no difference whether the plaintiff is the United States in name or a federal officer suing on its behalf. Indeed, in *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 286, the authority of the Secretary of Labor to enforce the Fair Labor Standards Act was stressed in support of the conclusion that private citizens cannot sue for such enforcement in the federal courts:

> By holding that Congress did not lift the sovereign immunity of the States under FLSA, we do not make the extension of coverage to state employees meaningless. * * * [The Act] gives the Secretary of Labor authority to bring suit * * * . * * * [S]uits by the United States against a State are not barred by the Constitution. See *United States* v. *Mississippi*, 380 U.S.128, 140-141. [411 U.S. at 285.]

See, also, *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 145-146.

The decision in *Employees* also explicitly disavowed the position urged here by petitioner (Pet. 12-14) that the financial burden of compliance is in itself a barrier to the inclusion of States within the enforcement provisions of the Act:

> Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. [411 U.S. at 284.][2]

2. The Fair Labor Standards Act provisions in issue here were amended in 1974 (P.L. 93-259, Sec. 6(a)(5), 88 Stat. 59), effective May 1, 1974. The court below considered the Act as it stood before this amendment, and correctly concluded that it applied by its terms to the institutions here involved, which petitioner describes as "hospitals and * * * institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises or * * * schools for the mentally or physically handicapped or gifted children" (Pet. 5). Such institutions are specifically enumerated in 29 U.S.C. 203(s)(4), which provided, before May 1, 1974, that any such institution, whether public or private, was a covered enterprise if it had "employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods

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[2] *Edelman* v. *Jordan*, *supra*, relied upon by petitioner, is not to the contrary. In *Edelman*, this Court held that the Eleventh Amendment was violated by a decree in a suit by a private citizen which ordered the State to make retroactive welfare payments. But the Court distinguished situations in which, as here, the suit is brought on behalf of the United States, noting that the line of cases which "reaffirmed the principle that the Eleventh Amendment was no bar to a suit by the United States against a State," slip op. at 18, were simply not applicable to suits by private citizens. Similarly, the Court's conclusions in *Edelman*, concerning retroactive payments in suits by citizens, are not applicable here.

that have been moved in * * * commerce * * * ."[3] Upon the undisputed facts, each of the institutions has employees who are "engaged in commerce" as well as employees who handle goods that have "been moved in * * * commerce."[4]

(a) The employees of the institutions are admittedly engaged in four classes of activities (Pet. 5), each of which, under settled authority, constitutes engaging in interstate commerce for purposes of the Act: (1) All of the nine institutions have employees who are regularly engaged in the preparation, transmission, and receipt of business correspondence and papers to and from out-of-state points. *Montalvo* v. *Tower Life Building*, 426 F. 2d 1135, 1143 (C.A. 5); *Wirtz* v. *Wardlaw*, 339 F. 2d 785, 787 (C.A. 4). (2) All of the institutions also have employees who regularly receive direct shipments of articles of commerce transported from out-of-state points, and who handle, move, and store such articles upon their arrival. *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40, 42 (C.A. 6), certiorari denied, 335 U.S. 854; *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645, 648 [C.A. 5). (3) In eight of the nine institutions, there are employees who regularly handle interstate telephone calls in the course of their duties. *Mitchell* v. *Joyce Agency*, 348 U.S. 945, reversing *(per curiam)* 211 F. 2d 241 (C.A. 7) and affirming 110 F. Supp. 918, 923; *Telephone Answering Service,*

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[3]This language was changed by the 1974 amendments to read "or employees handling, selling, or otherwise working on" such goods. This was done to "reflect more clearly that the 'including' clause was intended as an additional basis of coverage." S. Rep. No. 93-690, 93d Cong., 2d Sess. 17.

[4]It is no defense to assert that the State itself is not "in commerce" (Pet. 10-12). Section 3(s) refers to an enterprise which has *employees* in commerce, or in stated commerce related activities.

Inc., v. *Goldberg*, 290 F. 2d 529, 532 (C.A. 1). (4) And in six of the nine institutions, there are employees who regularly engage in interstate travel in transporting or accompanying patients and residents to out-of-state places for treatment, diagnosis, and other purposes. *Mitchell* v. *Kroger Co.*, 248 F. 2d 935, 939 (C.A. 8). The institutions in question are thus covered enterprises under the provisions of Section 3(s)(4).

(b) Alternatively, the institutions are covered enterprises because they have employees "handling * * * or otherwise working on goods that have been moved in * * * commerce."[5]

Petitioner concedes that each of the institutions regularly receives and uses medicines, supplies, and equipment which come from outside the State and has employees who regularly handle or work on those commodities (Pet. 5). It contends, however, that those commodities were not "goods" because the definition of goods in Section 3(i) (29 U.S.C. 203(i)) excludes articles that are in the physical possession of the "ultimate consumer" (with certain exceptions). Petitioner claims to be the "ultimate consumer" of the medicines, drugs, medical supplies, food, clothes, equipment and the like, which it uses in extending medical and other services to the patients and residents of its institutions (Pet. 8-10).

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[5]The extension of coverage to enterprises with such employees is evidently in recognition of the "obvious economic fact that demand for a product causes its interstate movement quite as surely as does production" (see 107 Cong. Rec. 6236), and that the consumption of goods resulting from activities following their interstate movement is an important factor in maintaining the flow of replacement goods. See S. Rep. No. 145, 87th Cong., 1st Sess.; H. Rep. No. 75, 87th Cong., 1st Sess.

The rejection of this contention by the court below was in accord with the decision in *Brennan* v. *Dillion,* 483 F. 2d 1334, 1337 (C.A. 10), which held that the exception in Section 3(i) for the ultimate consumer was intended to protect the retail customer from the provisions of Section 15(a)(1) (29 U.S.C. 215(a)(1)) proscribing the transportation of goods produced in violation of the Act, not to exempt employers who use up materials in the performance of their services. There the tenants of an apartment house complex, and not the operators, were deemed the ultimate consumers of the paints, cleaning materials, and light bulbs used in maintaining the complex.[6] Similarly, here, it is the patients and the residents of the institutions who are the ultimate consumers of the medicines, food, and the like, and of the supplies and equipment used in maintaining the institutions.

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[6]There are no inconsistent decisions of this Court or of the courts of appeals. Indeed, in *Maryland* v. *Wirtz,* 392 U.S. 183, 200-201, this Court refused to conclude that schools and hospitals are the ultimate consumers of the out-of-state products they buy; it noted that such products are put to a wide variety of uses in the institutions involved, implying that at least some such uses are within the Act. The courts of appeals have uniformly concluded that businesses were covered when their employees handled goods that had moved in commerce although such goods were necessarily consumed in the employer's operations: *Wirtz* v. *Melos Construction Co.*, 408 F. 2d 626, 629 (C.A. 2), construction work using concrete made of materials of out-of-state origin; *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F. 2d 689 (C.A. D.C.) automatic laundries using soaps and detergents of such origin; *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F. 2d 658 (C.A. 4), operations of a painting subcontractor using paints and materials of such origin:

Walling v. *Jacksonville Paper Co.*, 317 U.S. 564, does not, as petitioner contends, establish a test for interpreting the "ultimate consumer" exception. That exception appears in the definition of "goods" in Section 3(i) and is therefore applicable to coverage based on engagement in "the production of goods for commerce" or on handling "goods that have been moved" in commerce. *Jacksonville* dealt with a different basis for coverage; it determined only when employees were to be considered "in commerce." No definition of "goods" was there involved.

3. Even if the statute's applicability to state institutions of the kind here involved were debatable under the statute in effect when this suit was commenced, the Fair Labor Standards Amendments of 1974 conclusively settle the matter, by specifically providing that the "employees of an enterprise which is a public agency shall * * * be deemed to be employees engaged in commerce" in all cases. P.L. 93-259, Section 6(a)(5)(E). The amendments also make clear that an enterprise with employees handling goods which have moved in interstate commerce is covered, regardless of whether it also has employees who are in such commerce or producing goods for such commerce. They dispose of the "ultimate consumer" objection by referring not only to "goods," which are defined to exclude items received by ultimate consumers, but also to "materials." P.L. 93-259, Section 6(a)(5). Thus, the issues presented by this case will not recur, since the holding is based on superseded language.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JACOB I. KARRO,
DENNIS M. RACE,
Attorneys,
Department of Labor.

AUGUST 1974.